Supreme Court of the United States

OCTOBER TERM, 1943.

(No. 1052) 138

GRAYBAR ELECTRIC COMPANY, INC.,

Petitioner,

against

NEW AMSTERDAM CASUALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner.

BREED, ABBOTT & MORGAN,
Attorneys for Petitioner.

DANA T. ACKERLY,
WILLIAM L. HANAWAY,
STODDARD B. COLBY,
GEORGE W. MORGAN, JR.,
Of Counsel.

INDEX.

Table of Cases Cited.

Table of Statutes Cited.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Graybar Electric Company, Inc., a Corporation organized under the laws of the State of New York, respectfully shows:

Your petitioner seeks review of a determination of the Court of Appeals of the State of New York on March 10, 1944 (292 N. Y. 246), reversing a judgment of the Appellate Division of the Supreme Court, First Judicial Department of that State in favor of petitioner, as plaintiff, against New Amsterdam Casualty Company, as defendant. The latter judgment affirmed a judgment of the Special Term, New York County, striking out the answer of the defendant and directing summary judgment in favor of the plaintiff (petitioner), in the sum of $39,910.58.

The Court of Appeals remitted the record to the Supreme Court of the State of New York, County of New York, on March 10, 1944; this latter court, on March 16, 1944, entered a judgment making the determination of the Court of Appeals its judgment. Judgment of reversal was entered in the Office of the Clerk of the Supreme Court for the County of New York on the 30th day of March, 1944.

Summary Statement of Matters Involved.

A.

The Bond in Suit.

Petitioner, a materialman, commenced an action in the Supreme Court of the State of New York in 1941, against the respondent upon a performance bond (Appendix A) given by respondent in connection with the construction, partly through United States Government monies, of a Rural Electrification Public Works Project for the City of Knoxville, Tennessee.

The bond was written on a form required by the Rural Electrification Administration for all work done anywhere in the U. S. and ran in favor of the United States Government, the City of Knoxville and was, by its express terms,

> "made for the benefit of all persons, firms and corporations, who or which may furnish any materials or perform any labor for or on account of the construction to be performed, * * * and they and each of them are hereby made obligees hereunder with the same force and effect as if their names were written herein as such and they and each of them *may sue hereon.*

B.

The Action.

The petitioner furnished materials in accordance with the terms of a contract covered by the aforesaid bond and upon the failure of its consignee to pay, brought suit upon such bond as a common law contract voluntarily entered into for the amount due, aggregating $36,608.90, together with interest thereon.

C.

The Defenses.

There was no question raised about the relationship of petitioner to the bond nor could there be but the respondent interposed as a defense to the suit certain sections of the Tennessee Code (copies of which are hereto attached as Appendix B), asserting that said sections of the Tennessee law *not referred to in the bond at any place* were applicable and that irrespective of the actual terms of the bond which were much broader and more liberal than the Tennessee statutory bond, the right of the petitioner and the duties of the respondent had to be carved down to fit the requirements of the Tennessee law, which merely set up for the protection of workingmen and materialmen certain minimum requirements of bonds furnished in connection with public works.

D.

Opinion of the New York Supreme Court.

Since there was thought to be no issue of fact petitioner moved for summary judgment which motion was granted and a judgment in its favor entered by the Clerk of the Supreme Court for the County of New York on March 13,

1942, the Court holding that ". . . The bond followed the form prescribed by the United States Government in P.W.A. projects. The bond contained no reference to Tennessee statutes nor to the short statute of limitations therein provided. . . . It is a common law bond not given pursuant to any Tennessee statute and so construed the first three defenses must be stricken out. . . ." A copy of the opinion of the Supreme Court of the State of New York is hereto annexed as Appendix C. The Court held that the Tennessee Statutes were inapplicable since the right of action arose out of the contract between the parties and not out of the Statute.

E.

Affirmance by the Appellate Division of the Supreme Court of the State of New York.

Upon appeal by respondent to the Appellate Division of the Supreme Court, First Department, the judgment in favor of the petitioner was unanimously affirmed without opinion.

F.

Proceedings Taken in the Court of Appeals.

Thereafter, respondent sought for and obtained leave to appeal to the Court of Appeals of the State of New York.

Pending the determination of such appeal, a decision was rendered by the highest Court of Tennessee (*City of Knoxville* v. *Burgess, Inc., et al.*, 175 S. W. (2nd) 548), adverse to the claim of this petitioner. That decision had a direct relationship to the New York case since it arose out of the same default and the same bond and respondent in reliance thereon urged the New York Court of Appeals to apply the Full Faith and Credit Clause and thereby injected a Federal question into the litigation.

Respondent asserted that by reason of the decision of the Supreme Court of Tennessee in *City of Knoxville* v. *Burgess, Inc., et al.*, referred to above (a copy of which is hereto annexed, marked Appendix D) "a Federal question was and is involved, and that the refusal of the New York Court of Appeals to apply the Tennessee decision would be violative of the Full Faith and Credit Clause and the Due Process Clause of the Constitution of the United States". This had also been raised by respondent in the brief on the appeal before the decision in the *Burgess* case was handed down.

The Tennessee Court in the decision in the *Burgess* case held that it was a condition precedent to a suit in Tennessee on any performance bond irrespective of its own free terms that a notice of claim be given and that a short Statute of Limitations of that State be observed.

The Supreme Court of Tennessee, however, remanded the case to try the issue of fact as to "possible equities by way of waiver or estoppel in favor of Aluminum Company (one of the parties to that suit) which called for an answer by the Surety and development of all the facts". In its order remanding the case, the Court characterized the local Tennessee Statute as a Statute of Limitations.

G.

Opinion of the Court of Appeals of the State of New York.

On March 10, 1944, the Court of Appeals rendered an opinion (a copy of which is annexed as Appendix E). Pursuant to such opinion, the judgments below were reversed and judgment entered in favor of respondent dismissing petitioner's complaint.

The New York Court of Appeals specifically recognized the *Burgess* case and applied the Full Faith and Credit

Clause and in addition held that the Tennessee Court had determined that the provisions of the Tennessee law did not affect the remedy alone, but were limitations upon the obligation itself and constituted conditions precedent to a suit on the bond—all this notwithstanding that the bond was a voluntary agreement between the parties that fixed their rights and obligations unconditioned by or unrelated to any Statute of Tennessee.

H.

Motion for Reargument in Court of Appeals.

Petitioner moved for a reargument of the appeal in the Court of Appeals on April 3, 1944. This was denied ten days later.

The grounds of the motion were that the Court of Appeals had overlooked the fact that in remanding the case for the purpose of trying the issue of waiver and estoppel, the Tennessee Court had necessarily determined that the provisions of the Tennessee law did not constitute conditions precedent to the right of action which could not be waived but were rules of procedure only.

Petitioner's motion for reargument was likewise based upon the Constitutional ground that the Court of Appeals of the State of New York had erroneously accorded extra-territorial effect and full faith and credit to the judgment of the Tennessee Court in violation of the petitioner's Constitutional rights.

As a result of the Court of Appeals' action, petitioner urged that it had been deprived of due process and that the obligation of its contract with the respondent had been impaired in violation of petitioner's Constitutional privileges.

No reason existed for sooner raising the Constitutional questions, both because the respondent had itself already formally injected that question and because no reason had existed for anticipating the action of the New York Court of Appeals.

In any event, the New York Court of Appeals decision supplies "a new and unexpected basis for a claim by the defeated party of the denial of a federal right" (*Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, p. 367) and justifies the present application to this Court for a writ of certiorari under its raling in the case just cited.

J.

Jurisdiction of this Court.

The order and judgment of the Court of Appeals of the State of New York was made and entered the 10th day of March, 1944, and said order and judgment was made the order and judgment of the Supreme Court of the State of New York for the County of New York on the 16th day of March, 1944. The Court of Appeals of the State of New York is the Court of last resort and the highest Court of that State. Said orders and judgment are final.

The Jurisdiction of this Court rests upon Section 237(b), Judicial Code (28 U. S. C. A. 344(b)).

K.

Statutes Involved.

The primary statute involved is Tennesse Code, 1938, Sections 7955-9 (Appendix B).

L.

Reasons Relied on for Allowance of the Writ.

A Federal question of substance, not heretofore determined by this Court, was decided by the Court of Appeals of the State of New York in favor of the respondent because the New York Court held that the provisions of the Tennessee Code were applicable to the action brought in the State of New York by the petitioner, a resident of the State of New York, against the respondent, likewise a resident of the State of New York.

The necessary result of the decision of the Court of Appeals of the State of New York is to give extraterritorial effect to these provisions of the Tennessee Statute and to accord to them (erroneously, the petitioner respectfully asserts) full faith and credit under the Constitution of the United States in such a way as to deprive petitioner of due process of law and to impair the obligation of the contract between the respondent and the petitioner upon which the suit was brought.

Reasons less strong than these were held by this Court in *Hansberry* v. *Lee,* 311 U. S. 32, to justify the writ.

The decision of this Court in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944), constitutes a further ground for the granting of this petition.

Wherefore, petitioner respectfully prays that a writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and

proceedings herein; and that the determination of such Court and the order and judgment thereon be reversed by this Honorable Court and that the petitioner have such other and further relief in the premises as to this Honorable Court may seem just.

Dated: June 6, 1944.

GRAYBAR ELECTRIC COMPANY INC.,
Petitioner,

BREED, ABBOTT & MORGAN,
Attorneys for Petitioner.

DANA T. ACKERLY,
WILLIAM L. HANAWAY,
STODDARD B. COLBY,
GEORGE W. MORGAN, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The issue awaiting this Court's solution is of public importance.

Shall a surety company which derives a profit from the bonding of a municipality's obligations be permitted to repudiate its bond on the ground that the provisions of a local State statute of limitations have not been complied with when the bonded obligations of its principal have acquired national scope and character, because the municipality has obtained for the project in which the obligations were incurred the financial assistance of the National Government, and because the municipality has sought and obtained for that public project the material resources of national private enterprise?

The decision of this Court in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944), constitutes a further ground for the granting of this petition.

A.

The bond itself (Record page 60, Appendix E) runs (a) to the Knoxville Electric Power and Water Board, Knoxville, Tennessee; (b) to the United States of America; and (c) to all persons and corporations who may furnish materials "for or perform labor on a Rural Electrification Administration Project known as Project REA, Tenn. 0030 A1-B1 Knoxville Public—PWA Docket Tenn. 3289 P * * *".

As the record shows, therefore, the City of Knoxville stepped over State lines—*first*, to request and obtain financial support for its project from the Federal Government—

next, to enlist the aid of national industry and to avail itself of the productive resources of the nation.

Not content with State facilities, the City sought the best and widest market to supply its needs.

Its obligations, therefore, which the respondent bonded, were nationwide. They ran to all its invitees, who dealt upon the faith of its appeal for aid.

Are the local statutory limitations of the State of Tennessee not referred to in any way in the bond in suit to be availed of by the City's bondsman as a trap for national business? Are not those who deal with a public institution embarked upon a public project entitled to expect and to receive something above the morals of the market place? By resorting to hindsight respondent has been enabled to crawl out of a contractual obligation bought and paid for by petitioner.

This respondent's bond ran to the United States Government. Would this Court have permitted, for example, the national credit to be jeopardized by failure to comply with the requirement of a State statute (had there been such) compelling the United States Government to file a ninety-day notice and bring a suit in the Courts of the State at the risk, otherwise, of nullifying millions of dollars worth of Government loans? Why should a different treatment be accorded the national Government than that accorded the national business enterprise which made the project possible?

Is it not clear, also, that important governmental policies and projects will in turn suffer from the curtailing effects upon the credit of municipalities which the chaotic application of such drastically short local statutes of limitations cannot fail to produce?

In a case decided in Tennessee after the *Burgess* case, but before the instant case, *Ben M. Hogan* v. *Walsh & Wells*

Inc. et al. (177 S. W. (2d) 835, Feb. 5, 1943, opinion attached hereto as Appendix F), the highest Court of Tennessee, itself, adopts views at variance with its decision in the *Burgess* case and which, if anything, favor the petitioner's contentions. Petitioner all along has contended that the terms of the bond in suit were much broader than the minimum requirement of the Tennessee statute, that it gave materialmen and laborers their full statutory protection and much more. The same was true in the *Walsh & Wells* case, except in the bond furnished in that case reference was made to the statute. In our case, while no mention was made of any statutory provision, the bond expressly granted to the obligees the clear right to "sue hereon." Speaking of the Walsh & Wells bond the Supreme Court of Tennessee said (177 S. W. (2d) 835, 836):

> "Here the language of the bond is broader and more comprehensive and exceeds the provisions of the statutes and refers to the statutes, '*and also independently of said statutes*'. The Court of Appeals (*intermediate Tenn. Appellate Court*) held that the words 'and also independently of said statutes' must be given some meaning and were no doubt added for the protection of those persons who might furnish labor and materials on said contract but who for some reason might not be entitled to recover by virtue of the statutes, and that this provision was inserted in the bond in accordance with the policy of the Federal Emergency Administration to furnish employment to a large class of people who were unemployed in a time of widespread depression and naturally to see that they were paid their just claims, notwithstanding their failure to meet the requirements of the statutes." (Emphasis supplied.)

Petitioner calls the Court's attention to the wording of the bond here in suit quoted in part page 2 of this Brief.

It gives materialmen and laborers the absolute right to *sue on the bond* in their own names. Surely this must be given some meaning too, and what could be more logical than bringing on action "independently" of said statute and this is precisely what petitioner did do.

B.

Still another ground exists for the granting of this writ.

This Court's decision in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944), applies with even greater force to the defendant insurance corporation here, and to its insurance contract—the indemnity bond in suit—because that insurance contract was written in and is an integral part of interstate commerce.

It needs no argument to demonstrate that the application to insurance contracts of special short statutes of limitations hidden away in the local statutes of some forty-eight State Legislatures constitutes the most direct fettering of interstate commerce imaginable. It is condemned by the express provisions of the Commerce Clause of the Constitution of the United States.

Within the purview of this Court's opinion in *Edwards v. California*, 314 U. S. 160, it now seems established in the light of the *Southeastern Underwriters Association* decision that insurance, at least of this type, is so clearly interstate commerce that it "does not admit of diverse treatment by the several States" (p. 176).

Where, as here, the insurance contract is so integral a part of interstate commerce, it follows that the attempted restraint of the State statute is not legitimate as merely "incidental" (*Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346).

In such a case, the fact that Congress may not yet have exerted (by specific legislation) its power under the Com-

merce Clause can make no difference where, as in the case at bar, the "interstate activities" so intimately involve "national interests" and are so obviously of a *non*-local character that they may *not* "appropriately be regulated in the interest of the safety, health and well-being of local communities" (see this Court's opinion, *Parker* v. *Brown*, 317 U. S. 341, pp. 362, 363).

Petitioner respectfully submits that this Court should act now before the States have become so entrenched in the field that Congress may be hampered in enacting proper regulatory legislation.

POINT II.

A real confusion has been produced by these two decisions of the Tennessee Court and by the New York Court's interpretation of the Tennessee Law.

Doubts thus created may have disastrous national consequences unless this Court will entertain the writ and thereby undertake by its decision to harmonize these conflicting holdings and dissipate the business uncertainty which they produce.

A.

Uncertainty Produced by the New York Court's Application of the Tennessee Court's Decision.

Standing by itself, *City of Knoxville* v. *Burgess*, *supra*, decided only:

1. That so far as the bond enured to the benefit of furnishers of labor and material, it was a statutory bond in the sense that it was given in accordance with the requirements of the Tennessee Statute;

2. That when the bond was put in suit in a Tennessee Court, it was subject to the provisions of Sections 7955-7959 of the Tennessee Code; and

3. That, far from creating conditions precedent to the obligation, the provisions of the Tennessee Statute imposed limitations only upon the remedy in the Courts of that State and were susceptible of waiver and estoppel. The Tennessee Court, in fact, remanded the cause for the express purpose of inquiry into these two issues of fact.

The New York Court of Appeals lifts this decision from its context; gives it an extra-territorial application never intended by the Court that rendered it, and then reads into that decision meanings and implications beyond anything that it was either necessary or possible for the Tennessee court to have adjudicated in that action.

B.

Confusion Produced by the Tennessee Court's Later Decision in the Case of *Hogan* v. *Walsh & Wells, Inc.*

This case, by its reference to the previous decision in *City of Knoxville* v. *Burgess*, casts doubt upon the scope and intention of the Tennessee Court's previous decision.

The later decision indicates an uncertainty and ambiguity in the Tennessee Court's interpretation of its own Statute. This later decision, if followed by the New York Court of Appeals, would have resulted in a recognition of the common law aspects of the bond in suit. Consistency in Court decisions is essential—to adopt different standards for similar situations is arbitrary. In the present confused situation, the rights of business interests, dealing in interstate commerce and across State lines, are made to depend either upon the addition or omission from a public projects' bond of a mere phrase or else upon knowledge of local circumstances and requirements which it is grossly unfair and unreasonable to impute to them. The material of this petitioner went into this public project. This

Court has very recently expressed its views with regard the protection of those who put their efforts and materials into public projects. See *Clifford F. MacEvoy etc., Petitioners* vs. *U. S. of A. etc.*, decided April 24, 1944 (..... U. S. ....., 88 L. Ed. 795).

These facts, petitioner submits, involve important public issues and affect nationwide rights and interests in addition to the private rights and interests involved in the present litigation.

To compose these difficulties, therefore, and to restore to the petitioner its personal Constitutional rights, of which the judgment of the Court of Appeals deprives it, it is respectfully submitted that the Court should grant the present application for a writ of certiorari directed to the Court of Appeals and the Supreme Court of the State of New York.

C.

Confusion Produced by Conflict with this Court's own Previous Decisions.

1. In *Mid-State Horticultural Co. Inc.* v. *Pennsylvania Railroad Co.*, 320 U. S. 356 (decided Nov. 22, 1943), this Court again laid down the fundamental principle that a statute which bars only the remedy (unlike one which extinguishes the right) may be waived.

The necessary effect of the Tennessee Court's action in remanding the *Burgess* case, *supra*, is to adjudicate that the statute in question affects only the remedy and is consequently a mere Statute of Limitation. The New York Court's contrary interpretation of these statutes, both ignores the actual holding of the Tennessee Court and conflicts with the principle announced by this Court in the *Mid-State Horticultural* case.

2. The decision of the Court of Appeals of the State of New York further conflicts with the decision of this Court in *International Steel & Iron Co.* v. *National Surety Co.* (1935) 297 U. S. 657. This Court there construed an indentical Tennessee Statute relating to a public contractor's bond given in connection with a project undertaken by the State of Tennessee through its Department of Highways & Public Works. This Court held that this Tennessee Statute created no new contractual right, saying (Opinion, page 664):

> "The Statute itself confers no contractual right, on any subcontractor, nor does it by its own force confer upon him any new remedy * * *."

This Court's decision in that case purports to be founded on a long line of previous decisions of the Tennessee Court, both with respect to the statute there, and the statute here, involved.

All previous decisions of the Tennessee Court have recognized the existence of a right of action at common law on just such a contract as was created by this bond.

> *Ruohs* v. *Trader's Fire Ins. Co.* 111 Tenn. 405; 78 S. W. 85
>
> *Standard Oil Co. of La.* v. *Jamison Bros. Inc.* 166 Tenn. 53; 59 S. W. 2d 522

3. Finally, the erroneous extension to the Tennessee Statute of Limitations of full faith and credit by the New York Court of Appeals conflicts with this Court's previous decision in *Magnolia Petroleum Co.* v. *Hunt* (Oct. Term 1943) 320 U. S. 430. This Court there accurately stated a settled rule of construction of the Full Faith and Credit Clause, saying (at pp. 436, 437):

> "In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events."

D.

Confusion Produced by the Departure of the New York Court of Appeals from its own Previous Decisions.

In *Clark Plastering Company* v. *Seaboard Surety Company*, 259 N. Y. 424, the Court of Appeals of the State of New York announced its construction of just such a statute of the State of New Jersey as affecting the remedy only and not extinguishing the right.

The Court of Appeals proclaimed that (p. 429):

> "The cause of action here is upon a contract voluntarily made; it is not unknown to the common law; it is not contrary to our declared policy; and neither liability nor remedy has been supplied by a foreign statute."

Both the petitioner and respondent are, and at all times have been, residents and subject to the jurisdiction of the Courts of the State of New York and have contracted in the light of its decisions and acted upon the faith of the policy therein openly declared. That policy has been (*Sharrow* v. *Inland Lines, Ltd.*, 214 N. Y. 101) to construe such a statute as "a limitation upon the remedy and not upon the right" (p. 110) and (*Gutkind* v. *Lueders & Co.*, 267 N. Y. 320) to refuse to apply a foreign Statute of Limitations

when, as here, it deprives a citizen of the State of New York "of any right or relief" (pp. 331-332).

The Court of Appeals' present reversal of its previous policy impairs the obligation of the contract between the parties to the present litigation and violates petitioner's Constitutional right to due process of law.

POINT III.

The Writ prayed for should be granted.

Dated: June 6, 1944.

Respectfully submitted,

BREED, ABBOTT & MORGAN,
Attorneys for Petitioner.

DANA T. ACKERLY,
WILLIAM L. HANAWAY,
STODDARD B. COLBY,
GEORGE W. MORGAN, JR.,
of Counsel.

Appendix A.

Performance Bond.

1. Know all men that we, MELVIN F. BURGESS, INC., as principal, and NEW AMSTERDAM CASUALTY COMPANY, a corporation of the State of New York, as Surety, are held and firmly bound unto the Knoxville Electric Power and Water Board, Knoxville, Tennessee (hereinafter called the "Owner") and unto the United States of America (hereinafter called the "Government") and unto all persons, firms and corporations who or which may furnish materials for or perform labor on a Rural Electrification Administration Project known as Project REA, Tenn. 0030 A1—B1 Knoxville Public—PWA Docket Tenn. 3289 P and to their successors and assigns, in the penal sum of Two Hundred and fourteen thousand two hundred and sixteen—84/100 ($214,216.84) Dollars, as hereinafter set forth and for the payment of which sum well and truly to be made we bind ourselves, our executors, administrators, successors and assigns jointly and severally by these presents. Said Project is described in a certain construction contract (hereinafter called the "Construction Contract") between the Owner and the Principal, dated February 20, 1940, pursuant and subject to a certain loan contract (hereinafter called the "Loan Contract") between the Owner and the Government, acting through the Administrator of the Rural Electrification Administration (hereinafter called the "Administrator"), dated January 25, 1940.

2. The condition of this obligation is such that that if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of the Construction Contract and any amendments thereto, whether such amendments are for additions, decreases, or changes in materials, their quantity, kind or price, labor costs, mileage, routing or any other purpose

whatsoever and whether such amendments are made with or without notice to the Surety, and shall fully indemnify and save harmless the Owner and the Government from all costs and damages which they, or either of them, shall suffer or incur by reason of any failure so to do, and shall fully reimburse and repay the Owner and the Government for all outlay and expense which they, or either of them, shall incur in making good any such failure of performance on the part of the principal, and shall promptly make payment to all persons supplying labor and materials for use in the construction of the Project contemplated in the Construction Contract and any amendments thereto, and shall well and truly reimburse the Owner and the Government, as their respective interests may appear, for any excess in the cost of construction of said Project over the cost of such construction as provided in the Construction Contract and any amendments thereto, occasioned by any default of the Principal under the Construction Contract and any amendments thereto, then this obligation shall be null and void, but otherwise shall remain in full force and effect.

3. It is expressly agreed that this bond shall be deemed amended automatically and immediately, without formal and separate amendment hereto, upon any amendment to the Construction Contract, so as to bind the Principal and the Surety to the full and faithful performance of the Construction Contract as so amended, provided only that the total amount of all increases in the cost of construction shall not exceed 20 per cent of the amount of the maximum price set forth in the Construction Contract. The term "amendment", wherever used in this bond, and whether referring to this bond, the Construction Contract or the Loan Contract, shall include any alteration, addition, extension, modification, amendment, rescission, waiver, release or annulment, of any character whatsoever.

4. It is expressly agreed that any amendment which may be made by agreement or otherwise between the prin-

cipal and the Owner in the terms, provisions, covenants and conditions of the Construction Contract, or in the terms, provisions, covenants and conditions of the Loan Contract (including, without limitation, the granting by the Administrator to the Owner of any extension of time for the performance of the obligations of the Owner under the Loan Contract or the granting by the Administrator or the Owner to the Principal of any extension of time for the performance of the obligations of the Principal under the Construction Contract, or the failure or refusal of the Administrator or the Owner to take any action, proceeding or step to enforce any remedy or exercise any right under either the Construction Contract or the Loan Contract, or the taking of any action, proceeding or step by the Administrator or the Owner, acting in good faith upon the belief that the same is permitted by the provisions of the Construction Contract or the Loan Contract) shall not in any way release the Principal and the Surety, or either of them, or their respective executors, administrators, successors or assigns, from liability hereunder. The Surety hereby acknowledges receipt of notice of any amendment, indulgence or forbearance, made, granted or permitted.

5. This bond is made for the benefit of all persons, firms and corporations who or which may furnish any materials or perform any labor for or on account of the construction to be performed under the Construction Contract and any amendments thereto, and they and each of them, are hereby made obligees hereunder with the same force and effect as if their names were written herein as such and they and each of them may sue hereon.

In witness whereof, the undersigned have caused this instrument to be executed and their respective corporate

seals to be affixed and attested by their duly authorized representatives this 20th day of February, 1940.

MELVIN F. BURGESS, INC. (Seal)
Principal

By G. I. WHITMER, President.

Attest:

W. H. COLLINGS,
Secretary.

NEW AMSTERDAM CASUALTY COMPANY (Seal)
Surety

By BOYD WILSON, Vice-President.

Attest:

W. R. GOSWEILER,
Assistant Secretary.

Countersigned: CHAS. SYKES & SON,

By FELIX R. CHEATHAM,
Resident Agent of Surety for the
State of Tennessee.
Address 611 Third Nat'l Bk. Bldg.,
Nashville, Tenn.

Appendix B.

Michie's Tennessee Code of 1938.

§7955. *Bond for payment of material and labor used in public work; condition and penalty of bond; advertisement.*—No contract shall be let for any public work in this state, by any city, county or state authority, until the contractor shall have first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by said contractor, or any immediate or remote subcontractor under him, in said contract, in lawful money of the United States. The bond to be so given shall be for one-half of the contract price on all contracts of two thousand dollars, or under; one-half of the first two thousand dollars, and thirty-five per cent. of all over that amount on all contracts between two thousand dollars and five thousand dollars; and one-half of the first two thousand dollars, thirty-five per cent. on the balance on the next three thousand dollars, and twenty-five per cent. on the balance on all contracts over five thousand dollars. Where advertisement is made, the condition of the bond shall be stated in the advertisement; provided, that this statute shall not apply to contracts under one hundred dollars. In the event the contractor who has executed the bond gives notice, in writing, by return-receipt registered mail, to any laborer or furnisher of material or to any such immediate or remote sub-contractor, that he will not be responsible therefor, then such person who thereafter furnishes such material or labor shall not secure advantage of the provisions of this section, for materials furnished or labor done after the receipt of such notice. (1899, ch. 182, sec. 1; 1923, ch. 121, sec. 1; 1925, ch. 121, sec. 1, modified.)

§7956. *Written notice, to be given to whom, and when.*—Such furnisher of labor or material, or such laborer, to secure the advantage of the two foregoing sections, shall, after such labor or material is furnished, or such labor is done, and within ninety days after the completion of such public work, give written notice by return receipt registered mail, or by personal delivery, either to the contractor who executed the bond, or to the public official who had charge of the letting or awarding of the contract; such written notice to set forth the nature, and itemized account of the material furnished or labor done, and balance due therefor; and a description of the property improved; provided, that in the case of public work undertaken by a municipality, or any of its commissions, notice, or statement herein required, so mailed or delivered to the mayor thereof, shall be deemed sufficient; in the case of public work by any county of any of its commissions, notice or statement herein required, so mailed, or delivered to the chairman of the county court of such county, shall be deemed sufficient; in the case of public work by the state, or any of its commissions, notice and statement herein required, so mailed, or delivered to the governor, shall be deemed sufficient. (1899, ch. 182, sec. 4; 1923, ch. 121, secs. 2, 4; 1925, ch. 121, sec. 4, modified.)

§7957. *Misdemeanor to fail to require bond.*—If any public officer, whose duty it is to let or award contracts, shall let or award any contract without requiring bond for payment of labor and material, in compliance with the provisions of section 7955, such officer shall be guilty of a misdemeanor. (1899, ch. 182, sec. 3; 1925, ch. 121, sec. 3, modified.)

§7958. *Action on bond, by whom.*—Any laborer or furnisher of labor or material to said contractor, or to any immediate or remote sub-contractor under him, may bring an action on said bond, and have recovery in his own name, upon giving security, or taking the oath prescribed for poor persons as provided by law; but in the event of such suit, the city, county or state, shall not be liable for any costs accruing thereunder. (1899, ch. 182, sec. 2; 1923, ch. 121, sec. 3; 1925, ch. 121, sec. 2, modified.)

§7959. Joinder and limitation.—Several persons entitled may join in one suit on such bond, or one may file a bill in equity in behalf of all such, who may, upon execution of a bond for costs, by petition assert their rights in the proceeding; provided, that action shall be brought or claims so filed within six months following the completion of such public work, or of the furnishing of such labor or materials.

Appendix C.

Opinion of Special Term, Supreme Court, New York County.

(New York Law Journal Feb. 27, 1942)

Motion by plaintiff to strike out answer and for summary judgment is granted and defendant's cross-motion to dismiss is denied. Plaintiff, a materialman, sues defendant under a bond given for the benefit of any persons furnishing material pursuant to a contract of construction. Melvin F. Burgess, Inc., entered into a contract with the City of Knoxville, Tenn., for the construction or improvement of the electric distribution system for that city, known as "Contract F.-Rural Extensions; R. E. A. (Rural Electrification Administration) Project Tenn. 0030 A1-B1 Knoxville Public; P. W. A. Docket No. Tenn. 3289-P." Plaintiff furnished materials and has not been paid. Defendant contends that the complaint should be dismissed in its entirety because the bond sued upon is a statutory bond under the law of Tennessee; that the action was not brought within the six-months' period prescribed by such statute of Tennessee and that plaintiff has not pleaded nor proved compliance with conditions precedent; defendant also asks summary judgment on the ground that certain materials were not used in the job. The bond follows the form prescribed by the United States Government in P. W. A. projects. The bond contains no reference to Tennessee statutes nor to the short statute of limitations therein provided. Although the contract is made with the City of Knoxville and under ordinary circumstances would be subject to the laws of Tennessee, this contract is for a federal project and the bond given thereunder is to be liberally construed in favor of those for whose benefit it was given. It is a common law bond not given pursuant to any Tennessee statute and so construed, the first three defenses must be stricken out. The fourth defense is stricken out for the reason that if the Tennessee statutes do not apply then it is not necessary to allege and prove that the materials were "used" by the contract. The materials were furnished and the bond provides that it is for materials furnished for or on account of the construction to be performed.

Appendix D.

Opinion of the Supreme Court for the Eastern Division, State of Tennessee.

(175 S. W. (2d) 548.)

CITY OF KNOXVILLE

v.

MELVIN F. BURGESS, INC., *et al.*

GREEN, Chief Justice.

City of Knoxville, through a subsidiary, entered into a contract with Melvin F. Burgess, Inc., to construct an extension to the City's electric distribution system at a cost of $200,000. The work was completed and accepted and there remains in the hands of the City a balance of some $19,000 retained percentage.

It appears from a bill filed by the City that a number of persons furnishing material for this work have not been paid by the contractor. It further appears that the contractor executed a bond with New Amsterdam Casualty Company as surety to secure performance and to indemnify the City against default and also to protect laborers and materialmen. And later the contractor undertook to assign its claim for the retained percentage to this surety.

Under these circumstances the City filed a bill, in the nature of a bill of interpleader, making the contractor, the surety and the several unpaid creditor defendants. One of the creditors, Aluminum Company of America, answered

the City's bill and filed a cross bill against the Burgess Company and the surety seeking a recovery against the two for the amount of its unpaid claim, some $9,000. The Surety Company demurred to this cross bill, its demurrer was sustained, and the cross bill dismissed outright. From this decree of the chancellor the surety has prosecuted an appeal to this Court.

The chancellor regarded as decisive of the merit of the cross bill the question as to whether the bond executed by the surety was a statutory bond or a common law bond. He was of opinion that in so far as the laborers and materialmen were involved the bond was a statutory bond under the laws of Tennessee and that suit thereupon was barred by Code § 7959. On the hearing before this Court the principal debate has been with respect to the nature of the bond.

Code § 7955 provides that "No contract shall be let for any public work in this state, by any city, county or state authority, until the contractor shall have first executed a good and solvent bond to the effect that he will pay for all the labor and materials used by said contractor, or any immediate or remote sub-contractor under him, in said contract, in lawful money of the United States * * *."

Section 7958 provides that any laborer or furnisher of labor or material to said contractor, or to any immediate or remote sub-contractor under him, may bring an action on said bond and have recovery in his own name, etc., etc.

Code §7959 is in these words:

"Several persons entitled may join in one suit on such bond, or one may file a bill in equity in behalf of all such, who may, upon execution of a bond for costs, by petition assert their rights in the proceeding; *provided*, that action shall be brought or claims so filed within six months following the completion of such public work, or of the furnishing of such labor or materials."

The Aluminum Company concedes herein that its cross bill was filed more than six months following the completion of this public work or of the furnishing of materials by it. Hence the chancellor's decision.

In view of the allegations in its cross bill it is difficult to see how the Aluminum Company can maintain that the bond it here sues on, in so far as it affects laborers and materialmen, is a common law bond.

Code §7956 provides that the furnisher of labor or material, to secure the advantage of the statute, shall "within ninety days after the completion of such public work, give written notice by return-receipt registered mail, or by personal delivery, either to the contractor who executed the bond, or to the public official who had charge of the letting or awarding of the contract." The cross bill avers that cross-complainant believed this work to have been accepted by the City on November 22, 1940, and that "cross-complainant gave notice to the New Amsterdam Casualty Company as required by statute in Section 7956 of the Code of Tennessee for 1932, by sending a registered letter to the surety under date of November 19, 1940, notifying the surety of the amount of the claim and substituting (submitting) an itemized statement to support such claim."

It was set out in the cross bill that cross-complainant had been previously informed that the affairs of the original contractor were in the hands of the surety and that the surety was completing all unfinished contracts. The cross bill continues, "It is alleged that this notice was within ninety days from the completion of the contract, or of the furnishing of materials by this cross-complainant, and that notice to the surety under the above circumstances was notice to the contractor as required under Section 7956, and within the time, and in the form and manner required in said statute."

The cross bill then sets out certain negotiations that transpired between cross-complainant and the surety and charges that certain action of the surety "was a deliberate attempt to forestall your cross-complainant from filing suit and that such action amounted to a waiver of Section 7959 of the Code of Tennessee requiring suit to be instituted within six months following the completion of such public work or the furnishing of such labor or materials."

In another paragraph of the cross bill a certain statement of an officer of the surety is mentioned and it is averred that such a statement "constitutes a waiver of Section 7959 of the Code of Tennessee regarding the filing of suit within six months from the completion of the work or the furnishing of the material."

In still another paragraph of the bill a different act of the surety is charged "as a waiver of its right to the fund in the hands of the City of Knoxville and a waiver of Section 7959 of the statutes of Tennessee."

Thus obviously the theory of the cross bill was that in so far as materialmen were concerned the bond sued on was a statutory bond and the rights of materialmen with respect to the bond were controlled by the Tennessee statute. Upon such pleading as the foregoing the cross-complainant is scarcely entitled to recovery against the surety on the theory that the bond in suit is a common law obligation as to materialmen. Nevertheless we consider this contention.

It was virtually conceded in argument that the bond in question was dual in its nature. That is, in one aspect it protected the City, in another aspect it protected laborers and materialmen. Bonds of this nature have been before this Court previously and the obligations to the governmental agency on the one hand and to laborers and materialmen on the other have been treated as distinct and separate obligations although combined in one paper. *City of Bristol* v. *Bostwick*, 139 Tenn., 304; *Cass* v. *Smith*, 146 Tenn., 218. The obligation to the governmental agency may be subject to the common law and the obligation to laborers and materialmen may be subject to the statute if the latter obligation is only such an obligation as is required by the statute. *Cass* v. *Smith, supra.*

An examination of the bond before us in so far as laborers and materialmen are concerned readily demonstrates that the surety undertook no other or further obligation than is required by our statute. In the bond the surety undertook to make good any failure of the principal in failing to "promptly make payment to all persons supplying

labor and materials for use in the construction of the Project contemplated in the Construction Contract and any amendments thereto."

It is also provided in the bond that it was made for the benefit of all persons furnishing materials or performing labor on account of the construction to be performed under the contract or any amendments and that such persons were made obligees with the right to sue just as if their names were written in the instrument.

The liability to laborers and materialmen thus assumed by the surety is no whit greater than that imposed by the statute. The statutory bond as construed in *Cass* v. *Smith, supra,* was held to cover material furnished for use in the contract and it was held that an immaterial divergence from the language of the statute did not alter the nature of the bond so long as the obligation remained the same as that imposed by the statute.

Cross-complainant relies on a line of authorities which hold that when a bond is conditioned more broadly than the statute requires, a recovery on it may be had as upon a valid common law obligation. That is, when the provisions go beyond the statutory requirements they may be given effect as common law obligations. See *State, ex rel.* v. *American Surety Co.,* 24 Tenn. App., and cases therein cited. It is insisted that the provisions of the bond before us as to laborers and materialmen do go beyond statutory requirements in several particulars.

It is submitted by counsel that the Tennessee statute requires a bond for laborers and materialmen in a sum proportioned but not equal to the amount of the contract, according to the formula set out in Code §7955, whereas this bond is for the full amount of the contract. As we pointed out in *City of Bristol* v. *Bostwick, supra,* however, a bond like this is not alone for the protection of laborers and materialmen but for the indemnity of the city in case of the contractor's default. Being for the two-fold purpose, naturally the bond in amount exceeds the statutory amount that would have been required on account of laborers and materialmen.

Amici curiae, who filed briefs herein, point out that under Code § 7955, "In the event the contractor who has executed the bond gives notice, in writing, by return-receipt registered mail, to any laborer or furnisher of material or to any such immediate or remote sub-contractor, that he will not be responsible therefor, then, such person who thereafter furnishes such material or labor shall not secure advantage of the provisions of this section, for materials furnished or labor done after the receipt of such notice," and it is said the bond contains no such provision and is not therefore a statutory bond. Why should the bond contain such provision? As we have above noted, the statute does not prescribe the language to be used in the bond and this statutory right is given to the surety whether the bond contains any such provision or not. Such provision would be entirely useless.

It is said that the bond in suit contains provision for amendments of the construction contract and for the continued liability of the surety after the amendments and after extensions of time of performance by the owner, etc., etc. We held in *Cass* v. *Smith, supra,* that the obligation of the surety to laborers and materialmen were not affected by alterations or amendments of the contract agreed upon between the contractor and the owner. In that case the Court said of laborers and materialmen:

> "They were not parties to the alleged change in the the contract, and it is very well settled that the surety on a bond like this will not be relieved of the obligations to laborers and materialmen who did not participate in such an alteration agreement between the owner and the contractor."

In the foregoing the Court followed *Equitable Surety Co.* v. *United States,* 234 U. S. 448, and such is the general rule. Upon a consideration of many cases cited, the editor of a Note in 77 A. L. R., 195, expressed himself thus:

> "The dual nature of public contractors' statutory bonds conditioned both for the faithful performance

of the contract and for the payment of laborers and materialmen has been explained at another place. See subd. IX, a, *supra*. As there shown, the rights of laborers and materialmen are independent of the rights of the obligee in the bond, and are the same as though the two undertakings were embraced in separate instruments. In accordance with these principles, it is held that the right of laborers and materialmen to recover against the surety on such a bond cannot be defeated by any act or omission of the obligee named in the instrument, not authorized or participated in by the laborers or materialmen, although the conduct or default is such as would release the surety from liability to the obligee."

It is further urged that because this bond contains no provision for notice of claim after completion of the work or furnishing of labor or material and because it contains no period of limitation for suit, it cannot be regarded as a statutory bond. The statute does not prescribe any form in which the bond for the protection of laborers and materialmen is to follow. If this bond had contained a provision for notice and a provision limiting the time for suit, such provisions would only be effective in so far as they coincided with the statutory requirements as to notice and time of suit. It has been held in a number of cases where the statute was silent as to the terms of the bond, that in case of a conflict between provisions of the bond and provisions of the statute as to the time limits prescribed by the statute, the statutory limits would prevail. *Smith & W. Co.* v. *Carlsted*, 165 Minn. 313; *Lawson* v. *Board of Pub. Instruction*, 118 Fla. 246; *U. S. Fidelity & G. Co.* v. *Tafel Electric Co.*, 262 Ky. 792. The Kentucky case grew out of a Tennessee contract. The Court held that it was governed by the Tennessee statute and that although the bond provided a longer time in which suit might be brought than did the statute nevertheless the short limitation of the Tennessee statute controlled and barred the suit.

The provision in the bond before us that laborers and materialmen were to be considered as obligees of the bond with the right to sue thereon added no greater obligation than the statute imposed and did not change the character of the bond as to laborers and materialmen.

For the reasons stated we think the chancellor correctly held that in so far as laborers and materialmen were concerned the bond herein sued on was a statutory bond.

It is argued, however, that Code §7959 heretofore set out is in the nature of an amendment to previous legislation. That prior to the enactment of §7959 our statute contained no provision for the several persons entitled thereunder to join in one suit on the bond and that the concluding portion of the section "provided, that action shall be brought or claims so filed within six months, etc., etc.," relates only to suits in which several individuals join and not to suits by separate individuals.

For this proposition we are referred to the general rule that a proviso is generally to be construed in connection with the section of which it forms a part and confined to that section. *Frix* v. *State*, 148 Tenn. 478; Lewis' Sutherland on Statutory Construction, Vol. 2, p. 352. This rule, however, is not applicable where a contrary intent is plainly to be inferred. There will be no sense in limiting the time in which a joint suit might be brought by several laborers or materialmen to six months and allowing such parties six years in which to bring suit if they file separate actions. Such discrimination would be hard to sustain.

Section 7959 originated in the Code of 1932. It is not to be regarded as an amendment to an earlier Act but as a part of the Act of 1931 which promulgated the Code of 1932. Obviously the purposes of the section were to prevent a multiplicity of suits and to fix a short period of limitation in which suits of this nature might be brought. Statutes for the protection of laborers and materialmen on public works are in force in most of the States and these statutes quite generally contain provisions similar in both aspects to the provisions of §7959. Such provisions are contained in the federal statute providing for bonds to

secure laborers and materialmen on government works. USCA., §270 (b).

Our attention is called to a decision of the New York Supreme Court, affirmed without opinion by the Appellate Division, wherein a suit was brought on the bond before us in New York by one of the materialmen against the surety. It was held in that case that the bond was a common law bond. It does not appear from the opinion of the trial judge that the contract entered into between the City and the contractor with respect to which this bond was written was before the New York Court. That contract particularly sets out that all provisions of the bond should be complete and in full accordance with statutory requirements. That the bond should be furnished by a surety company authorized to do business in the State of Tennessee and should be executed by an agent resident in that State.

Regardless of the New York decision, however, and with due respect, under previous decisions of this Court, the bond before us, in so far as laborers and materialmen are concerned, must be treated as a statutory bond.

As heretofore stated, the chancellor dismissed the cross bill. We are not satisfied to dispose of the cross bill on demurrer. Although not distinctly or fully brought out, construing it favorably, we think the cross bill discloses possible equities by way of waiver or estoppel in favor of Aluminum Company which call for an answer by the surety and development of all the facts. The case will be remanded to this end.

We have been favored with able briefs of amici curiae representing other materialmen. In so far as these arguments go to the merits of the case before us, we have considered them fully. We think the technical points raised by amici curiae are not such as are available to persons appearing in such character.

Reversed and remanded. Costs of appeal divided.

Appendix E.

Opinion of the Court of Appeals of the State of New York.

(292 N. Y. 246.)

GRAYBAR ELECTRIC COMPANY, INC., Respondent, *v.* NEW AMSTERDAM CASUALTY COMPANY, Appellant.

Decided March 10, 1944.

APPEAL from a judgment entered June 7, 1943, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department, which affirmed an order of Special Term (COHALAN, J.), granting a motion by plaintiff for summary judgment.

G. Arthur Blanchet and *Arthur W. Clement* for Appellant.

William L. Hanaway and *George W. Morgan, Jr.*, for respondent.

LOUGHRAN, J. Plaintiff supplied to a contractor materials for the performance of public work at Knoxville, Tennessee, and upon default in payment therefor began this action on a performance bond whereby the defendant surety company undertook with the local public authorities to make good the claims of laborers and materialmen. The answer of the surety company sets forth provisions of a Tennessee statute which authorizes a bond of that type. The substance of the several defenses is that the plaintiff failed to comply with conditions laid down by this statute as necessary to the recovery demanded in the complaint.

On motion by the plaintiff, Special Term held the defenses to be invalid and awarded to the plaintiff a summary judgment for the price of the materials in question—$39,889.23. A cross motion by the defendant for summary dismissal of the complaint was denied. The Appellate Division affirmed and granted leave to the defendant to present the case to this court for review.

The ground of the decision at Special Term was that the bond in suit is a common-law bond. After that decision had been affirmed at the Appellate Division, the highest court of Tennessee in the case of *City of Knoxville* v. *Burgess* (— Tenn. —; 175 S. W. (2d) 548) pronounced this same bond to be a statutory bond insofar as the rights of laborers and materialmen are concerned. The bond was made and delivered in Tennessee and was there to be performed. Hence the character of the obligation of the instrument is to be determined in accordance with the relevant law of that State whether declared as common law or by statute. (*Teel* v. *Yost*, 128 N. Y. 387, 394.) We have been licensed to take judicial notice of foreign law (Civ. Prac. Act, §344-a). Accordingly, we now acknowledge the authority of *City of Knoxville* v. *Burgess* (*supra*) and we recognize the statutory nature of the bond in suit. (Whether section 344-a is to be applied in cases triable as of right by jury we need not now consider.)

The statute of Tennessee on which the surety company relies for its defenses makes these provisions: "Such furnisher of labor or material, or such laborer, to secure the advantage of the two foregoing sections [permitting them to sue on the statutory bond] shall, after such labor or material is furnished, or such labor is done, and within ninety days after the completion of such public work, give written notice by return-receipt registered mail, or by personal delivery, either to the contractor who executed the bond, or to the public official who had charge of the letting or awarding of the contract; such written notice to set forth the nature, and itemized account of the material furnished or labor done, and balance due therefor; and a description of the property improved; provided, that in the case of public work undertaken by a municipality, or any of its commissions, notice, or statement herein required, so mailed or delivered to the mayor thereof, shall be deemed sufficient * * *". (Tennessee Code, §7956.) "Several persons entitled may join in one suit on such bond, or one may file a bill in equity in behalf of all such, who may, upon execution of a bond for costs, by petition

assert their rights in the proceeding; provided, that action shall be brought or claims so filed within six months following the completion of such public work, or of the furnishing of such labor or materials." (Tennessee Code, §7959.)

Inasmuch as the bond in suit was given pursuant to this statute, the statutory text is to be read into the instrument. The notice so prescribed was never served by this plaintiff-materialman nor was this action commenced within the six months period so defined. In that state of the controversy, the decision now to be passed will determine this question: Do the provisions of the Tennessee statute pertain to the substance of the obligation of the bond in suit, with the result that the plaintiff has no case; or do these provisions go merely to the remedy for a breach of that obligation, with the result that they are immaterial, since the law that governs the remedy is the law of New York. (See *Reilly* v. *Steinhart,* 217 N. Y. 549.)

In *City of Knoxville* v. *Burgess* (*supra*), the highest Court of Tennessee said: "The statute does not prescribe any form in which the bond for the protection of laborers and materialmen is to follow. If this bond had contained a provision for notice and a provision limiting the time for suit, such provisions would only be effective in so far as they coincided with the statutory requirements as to notice and time of suit. It has been held in a number of cases where the statute was silent as to the terms of the bond, that in case of a conflict between provisions of the bond and provisions of the statutes as to the time limits prescribed by the statute, the statutory limits would prevail. *Smith & W. Co.* v. *Carlsted,* 165 Minn. 313; *Lawson* v. *Board of Pub. Instruction,* 118 Fla. 246; *U. S. Fidelity & G. Co.* v. *Tafel Electric Co.,* 262 Ky. 792. The Kentucky case grew out of a Tennessee contract. The Court held that it was governed by the Tennessee statute and that although the bond provided a longer time in which suit might be brought than did the statute, nevertheless the short limitation of the Tennessee statute controlled and barred the suit."

To our minds, these words mean that the provisions of the statute of Tennessee were limitations of the liability undertaken upon the bond in suit and not limitations of the rights of action thereby conferred upon laborers and materialmen. (Cf. *National Surety Co.* v. *Architectural Co.*, 226 U. S. 276; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407; *Clark Plastering Co.* v. *Seaboard Surety Co.*, 259 N. Y. 424.) The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the "public acts" of a sister State. (*John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178.)

It follows that the judgment should be reversed and the motion of the defendant for dismissal of the complaint granted, with costs in all courts.

LEHMAN, Ch. J., LEWIS, CONWAY, DESMOND and THACHER, JJ., concur; RIPPEY, J., dissents and votes to affirm.

Judgments reversed, etc.

Appendix F.

Opinion of the Supreme Court for the Middle Division of the State of Tennessee.

BEN M. HOGAN,

v.

WALSH & WELLS, INCORPORATED, *et al.*

Shelby Equity.

Decided February 5, 1944.

177 S. W. (2d) 835.

PREWITT, Justice.

The only question presented for our determination on the petition for certiorari filed by the Standard Accident Insurance Company, which has been granted and argument heard, is whether the Insurance Company, surety on the bond of Walsh & Wells, Incorporated, to the City of Memphis, is liable to the complainant Hogan for labor and materials furnished for a public works contract, although Hogan did not give notice of his claim within the time required by the statutes.

The chancellor held that the cause was controlled by the cases of *City of Bristol* v. *Bostwick*, 139 Tenn., 304, and *Cass* v. *Smith*, 146 Tenn., 218, where it was held that the bonds sued on were dual in their nature, executed (1) for the purpose of indemnifying the cities against losses arising from any defaults of the contractors in the completion of the work in accordance with the terms of the contracts, and (2) to secure the payment in full of claims for labor and materials used in the construction of the projects. In the two cases cited above it was held that the bonds had two aspects, but that the performance condition of the bonds on account of their language did not change the feature of the instruments as to the claims for labor and materials.

In the instant cause, however, it is insisted by complainant Hogan that the language in the bond was materially different from that appearing in the bonds in the cases above cited.

We think the present cause is distinguishable from the cases referred to and also the recent case of *City of Knoxville* v. *Melvin F. Burgess*, 180 Tenn., ..., 175 S. W. (2d), 548, in that the work was done under the provisions of the Federal Emergency Administration Public Works Act which authorizes the making of federal loans and grants to municipalities for the construction of public work projects to relieve the nation-wide unemployment, and the contract for the construction of this project required of the contractor not only what was required of him by the State Public Works Act but also what was required under the Federal Public Works Act. In accordance with the policy of said Act, the contract required (1) that the bond should be for the full amount to be paid for the construction of the project of over $400,000, or nearly four times the amount of a bond required of contractors under the State Public Works Act; and (2) that the bond should secure the City for the payment of all bills, including the hiring of teams, equipment or machinery, and the operators thereof used on the work, and for oil and gasoline consumed, and for all labor performed on the work.

The condition of the bond itself is as follows:

"* * * the said contractor shall assume all undertakings under said agreement or contract and shall assure and protect all laborers and furnishers of material on said work both as provided by Chapter 182 of the Acts of the General Assembly of Tennessee of 1899, and any and all amendments thereto, including, without being limited to, Chapter 121 of the Public Acts of 1923, and Chapter 121 of the Public Acts of 1925, all of which were codified and re-enacted in Sections 7955-7959 inclusive, of the Code of Tennessee of 1932, and also independently of said statutes.

"Now, THEREFORE, if the said contractor shall fully and faithfully perform all undertakings and obligations under the said agreement or contract hereinbefore referred to and shall fully indemnify and save harmless the said owner from all costs and damage whatsoever which it may suffer by reason of any failure on the part of said contractor so to do, and shall fully reimburse and repay the said owner any and all outlay and expense which it may incur in making good any such default and shall fully pay for all the labor, material and work used by said contractor or any immediate or remote contractor or furnisher of material under him in the performance of said contract, in lawful money of the United States as the same shall become due, then this obligation or bond shall be null and void, otherwise to remain in full force and effect."

As to that part of the bond relating to the claims of laborers and furnishers of material, the condition of the bond is that the contractor "shall assure and protect all laborers and furnishers of material on said work * * *, and also independently of said statutes."

In the three cases cited above the bonds were held to be statutory bonds because the conditions in the bonds were limited to the language of the statutes, and the furnishers of labor and materials had no right of action against the obligors except by virtue of the statutes. [Here the langauge of the bond is broader and more comprehensive and exceeds the provisions of the statutes and refers to the statutes, "and also independently of said statutes." The Court of Appeals held that the words "and also independently of said statutes" must be given some meaning and were no doubt added for the protection of those persons who might furnish labor and materials on said contract but who for some reason might not be entitled to recover by virtue of the statutes, and that this provision was inserted in the bond in accordance with the policy of the Federal Emergency Administration to furnish employment to a large class of people who were unemployed in a time of widespread depression and naturally to see

that they were paid their just claims, notwithstanding their failure to meet the requirements of the statutes.]

The parties were capable of entering into such an undertaking. The City had authority to demand a bond broader in its scope than that required by the State statutes, and the surety in the regular course of its business, and no doubt for a sufficient consideration, assumed all the obligations and conditions incorporated in the bond.

Where a statute requires that the contractor for a public improvement shall "give a bond conditioned for the payment of labor and materials, the bond may be conditioned more broadly than the statute requires, and if a bond so conditioned is voluntarily given in consideration of the contract, its extra-statutory provisions may be enforced as a valid common-law obligation." 43 Am. Jur., Public Works and Contracts, §146; *Clatsop County ex rel. Hildebrand* v. *Feldschau,* 101 Ore., 361, 199 Pac., 953, 18 A. L. R., 1221.

In the *Feldschau* case, in addition to the statutory condition "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials," etc., the bond was also conditioned to pay "all just debts, dues, and demands incurred in the performance of such work." In holding that the surety was liable under this latter provision, the Court said in 18 A. L. R. at page 1224:

> "* * * The surety company in the ordinary course of business, and it may be fairly assumed for compensation, voluntarily obligated itself as sponsor for Feldschau in the fairthful performance of the contract, and the performance of all of the conditions incorporated in the bond. The parties were competent to enter into the undertaking. The bond was not repugnant to the letter or policy of the law, but was strictly in accordance with the policy of the law in this state to provide for the payment of labor and supplies and expenses in the construction of public works. Although the statute did not require all of the conditions to be enumerated in the

bond, the county authorities were under a moral duty to protect persons with whom the contractor incurred such indebtedness in the performance of the work. The award of the contract for the improvement was a sufficient consideration for the promise of the contractor and his surety to pay such indebtedness. It is generally held that those furnishing supplies or extending credit, for whose benefit such a bond is given, may sue upon the bond, on the principles that the third person for whose benefit a contract is made by another may maintain an action thereon, although the consideration does not directly move from such third person."

See also *Puget Sound State Bank* v. *Galluci*, 82 Wash., 445, 144 Pac., 698, Ann. Cas. 1916A, 767.

We therefore hold that the condition "and also independently of said statutes" will inure to the benefit of laborers and materialmen so as to make the bond a common-law obligation rather than strictly a statutory one as to labor and materials.

It results that the decree of the Court of Appeals will be affirmed.

(21)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1091. 130

138

GRAYBAR ELECTRIC COMPANY, INC.,

Petitioner,

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

G. ARTHUR BLANCHET,
OSCAR R. HOUSTON,
ARTHUR W. CLEMENT,
Counsel for Respondent.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

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No. 1091.

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner,

—against—

NEW AMSTERDAM CASUALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The opinion of the New York Court of Appeals, which this Court is asked to review, is reported in 292 N. Y. 246 and is printed as Appendix E (p. 37) of the petition.

The opinion of the Tennessee Supreme Court construing the identical bond involved in the present action is reported in 175 S. W. (2) 548, and is printed as Appendix D (p. 28) of the petition.

The construction contract and the performance bond involved in this action were executed, delivered and to be performed wholly within the State of Tennessee.

Both the New York Court of Appeals and the Tennessee Supreme Court have held in these opinions (1) that the bond here involved was given pursuant to the Tennessee statutes, (2) that the provisions of the Tennessee statutes requiring a materialman to give written notice within

ninety days and to sue within six months are to be read into the bond with the same force and effect as if specifically set forth in the bond, and (3) that where, as here, the materialman has failed to give such written notice or to begin an action within the times specified in the statutes, he cannot recover on the bond.

These decisions of the highest Courts of New York and Tennessee are in exact accord and no conflict or "confusion" arises from them.

Facts.

The action was brought by petitioner, a materialman, against respondent, a surety company, to recover upon a performance bond executed and delivered in the State of Tennessee under the following circumstances:

On February 20, 1940, the Knoxville Electric Power and Water Board of the City of Knoxville, Tennessee (hereinafter referred to as the "Board"), acting on behalf of the City of Knoxville, Tennessee, awarded a construction contract to a contractor, Melvin F. Burgess, Inc. (hereinafter referred to as "Burgess").

That contract was made at Knoxville, Tennessee, and was for the improvement of the electric distribution system of the City of Knoxville, and was to be wholly performed in the State of Tennessee (R., pp. 110; 104).

The only parties to this contract were the Knoxville Electric Power and Water Board (acting for the City of Knoxville, Tennessee), and Burgess, the contractor (R., p. 110).

While the United States loaned money to the City of Knoxville in order to assist financially the City of Knoxville in the construction of the improvement to the city's electric system, that was done under a prior separate loan contract entered into some weeks before, between the Knoxville Board and the United States Government.

The United States Government is not a party to the construction contract and assumed no liability thereunder. No relation of any sort existed between the United States and the plaintiff, a materialman.

At the time of the execution of the construction contract, Burgess, as principal, and the respondent, as surety, executed and delivered to said Board, the performance bond *required by the Tennessee statute*.

Petitioner states that this "bond was written on a form required by the Rural Electrical Administration for all work done anywhere in the U. S.", and thereby seeks to give the erroneous impression that this bond was one "required" by the Rural Electrical Administration. Such is not the fact and there is no evidence to such effect.

This bond happens to be in the same form as one that can be purchased by anyone as part of a set of forms designated "Construction Contract (General Contract) for Rural Electrification Distribution Project", but that is as far as the matter goes, because the specimen form of construction contract included in the set of papers and designated "Construction Contract (General Contract) for Rural Electrification Distribution Project" was not the contract used in the present case.

The construction contract used in the present case required that the performance bond should be "in full accordance with Statutory requirements".

The uncontradicted fact is that the construction contract executed in the present case differs materially from the said specimen form (R., pp. 124, 125).

Specifically the construction contract required that the bond be amended to conform to the local requirements "where state statutes * * * contain additional and/or conflicting provisions". *No such requirement is found in the said specimen form of construction contract* (R., p. 125).

While the construction contract, here involved, between the Board and Burgess was, as we have said, for a public work in the State of Tennessee, that work was clearly not a "public work of the United States" within the Miller

Act. 40 U. S. C. A. §270(a), 270(b). If it had been, the New York State Court would have had no jurisdiction since the Miller Act requires suit to be brought in the Federal District Court in the district in which the work was performed.

Moreover, as the decision by the Tennessee Supreme Court in the *City of Knoxville* case pointed out, it has been repeatedly held that the performance bonds of this nature are dual in nature (p. 31—Petitioner's Brief) but that this performance bond, *in so far as materialmen are concerned*, is a statutory bond.

The relevant Tennessee statutes provide:

(1) That no contract shall be let for any public work in the State of Tennessee by any City until the contractor shall first have executed a bond to the effect that he will pay for all labor and materials used by said contractor in said contract (Petitioner's Brief, Appendix B, p. 24);

(2) That if any public officer whose duty it is to let contracts shall let any contract without requiring a bond for the payment of labor and material in compliance with the provisions of the Tennessee statute, such officer shall be guilty of a misdemeanor (Petitioner's Brief, Appendix B, p. 25);

(3) That in order to obtain the benefit of such a bond, the materialman shall within ninety days after the completion of the public work give written notice setting forth a detailed statement of claim * * * either to the contractor or to the public officer who had charge of the letting of the contract (Petitioner's Brief, Appendix B, p. 25);

(4) That any materialman may bring an action on the bond for recovery in his own name (Petitioner's Brief, Appendix B, p. 26);

(5) But that such an action on the bond must be brought within six months following the completion of the public

work or the furnishing of the material (Petitioner's Brief, Appendix B, p. 26).

At the outset it should be noted that this Tennessee statute requiring such a performance bond was enacted for the benefit of materialmen and laborers, and that the statute itself imposed, *as limitations of any liability on the bond*, two conditions precedent, *i. e.*, (1) that the materialman must file written notice of claim within ninety days after the completion of the work, and (2) commence action on the bond within six months following the completion of the public work or the furnishing of the material.

Petitioner, a materialman, failed to give the written notice of claim within the ninety day period fixed by the Tennessee statute as a limitation of liability on the bond. The petitioner also failed to bring the present action within the six months period also prescribed by the Tennessee statute as a limitation for liability on the bond.

POINT I.

No "conflict" or "confusion" exists between the decisions of the Tennessee Supreme Court and the New York Court of Appeals; as the New York case follows the Tennessee decision they are obviously in complete uniformity.

Prior to the commencement by petitioner of the within action, the City of Knoxville filed a bill of interpleader in the Chancery Court in Tennessee, naming as defendants the contractor, the surety and several unpaid creditors, including the present petitioner.

Thereafter petitioner, seeking to avoid this Tennessee action in which all interested parties were named as defendants, sued in New York on the Tennessee performance bond, in this present independent action, in which it alone was plaintiff.

Both parties moved for summary judgment in the New York action. The Justice at Special Term gave the plaintiff (petitioner) summary judgment and denied defendant's motion for summary judgment. Defendant appealed to the Appellate Division which affirmed the decision of the Court below without opinion, but granted defendant's motion for leave to appeal to the Court of Appeals.

Prior to the decision by the New York Court of Appeals, the Supreme Court of Tennessee (its highest court) rendered its decision in the Tennessee action, in which the petitioner, though named as a defendant, had declined to take part.

In that case (*City of Knoxville* v. *Burgess*, Appendix D to Petitioner's Brief) the Tennessee Supreme Court ruled that the identical bond in the present case is a statutory bond, that the Tennessee statutes requiring the bond created a new liability for the benefit of materialmen, and that the Tennessee statutory provisions requiring materialmen to give written notice of claim within ninety days, and to sue within six months, are limitations on a materialman's right to recover on the bond, compliance with both of which are conditions precedent to any recovery by a materialman on the bond.

There is no mistaking the language used by the Supreme Court of Tennessee in its said decision, and it was so interpreted by the New York Court of Appeals, which said:

> "To our minds, these words mean that the provisions of the statute of Tennessee were limitations of the liability undertaken upon the bond in suit and not limitations of the rights of action thereby conferred upon laborers and materialmen. (Cf. *National Surety Co.* v. *Architectural Co.*, 226 U. S. 276; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407; *Clark Plastering Co.* v. *Seaboard Surety Co.*, 259 N. Y. 424.)"

Recognizing its constitutional obligation, the New York Court of Appeals then said:—

> "The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the 'public acts' of a sister State. (*John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178.)"

and reversed the judgment and dismissed the complaint.

The action of the New York Court of Appeals in giving in this case "full faith and credit" to the applicable Tennessee statute as construed by the Tennessee Supreme Court, decides no Federal question not heretofore determined by this Court. In fact, the New York Court of Appeals cited and followed the decision of this Court in the case of *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178, where this Court held that a Georgia Court was obligated to give full force and credit to a New York statute, as construed by the New York Court of Appeals, which made a false statement in the written application for life insurance, a material misrepresentation avoiding the policy.

In that case, the contract of insurance was made in New York and this Court said that the giving effect in Georgia to the New York statute is merely a recognition that the parties to the contract had subjected themselves to statutory conditions. (See 299 U. S. at p. 182.)

Compare *Hartford Accident & Indemnity Company, et al.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), where Mr. Justice Roberts, writing for this Court said, at pages 149 and 150:

> "The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a

> state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co.* v. *Dick*, *supra*, p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made."

No adverse public policy in New York exists in this case.

Where no question of public policy is involved, the refusal to apply the law of the place of contracting and the determination of the rights of the parties by the law of the forum is not only a passive refusal to enforce the foreign contract, but is an affirmative enforcement of an altogether different contract which had no existence under the law of the situs.

The present action arises out of business done by the petitioner in the State of Tennessee. When it did business in Tennessee, the petitioner subjected itself to the laws of Tennessee and it cannot escape the operation of the Tennessee statutes merely by crossing state lines and starting an action in the Courts of New York.

To permit one rule to be applied in Tennessee and a different rule in New York would produce the "confusion" which petitioner "fears" but which does not now exist.

On the contrary, complete uniformity will result in all the forty-eight states if, as here, the elementary principle is recognized and enforced that rights under a contract are to be determined by the law of the state wherein it was executed and to be performed and that "full faith and credit" must be given in every other state to the statutes and decisions of the courts of the state wherein the contract was made.

The effect of the New York Court of Appeals decision in the present case is merely to make certain that all creditors will receive the same uniform treatment regardless of the state wherein the action is brought, and to serve notice that no creditor can obtain preferential treatment by doing what this petitioner did, *i. e.*, refuse to participate in a local action wherein all interested persons were parties.

In addition to the New York and Tennessee decisions, the Supreme Court of Kentucky in *United States Fidelity & Guaranty Co.* v. *Tafel Electric Co.*, 262 Ky. 792 (1935), construed the identical Tennessee statute and held that the Tennessee statute requiring that action must be brought on the bond within six months, operated as a limitation of the liability on the bond. (In the *City of Knoxville* case, the Supreme Court of Tennessee quoted, with approval, from the *Tafel Electric Co.* case.)

The above quoted decisions show that the highest courts of three states—New York, Tennessee and Kentucky—which have passed on these Tennessee statutes have all reached one identical uniform result.

POINT II.

Entirely aside from its failure to sue in time, petitioner's claim was completely barred by its failure to comply with the provisions of the Tennessee statute requiring it to give notice of claim as a condition precedent to recovery on the bond.

Petitioner has avoided the issue that its claim was barred by its failure to file notice of claim as required by the Tennessee statute.

The Tennessee statute provides that in order for a materialman to obtain the benefit of the bond he shall within ninety days after the completion of the public

work give written notice setting forth a detailed statement of claim by return-receipt registered mail or by personal delivery to the contractor.

Compliance with this condition precedent is necessary to the maintenance of the action.

> *City of Knoxville* v. *Melvin F. Burgess, Inc. et al.*, —— Tenn. ——, 175 S. W. (2) 548.

In *Maryland Casualty Co.* v. *Clark's Creek Drainage Dist. No. 6*, 4 Tenn. Appeals Reports 380 (1926), the Court said, at page 389:

> "Such filing is a condition precedent to the right to maintain an action or obtain a recovery on such bond."

In *Cass* v. *Smith*, 146 Tenn. 222 (1921), the Supreme Court of Tennessee said, at page 230:

> "The language of the statute, respecting notice is too plain to be frittered away."

As the Tennessee Supreme Court itself pointed out in the *City of Knoxville* case (see Appendix D, Petitioner's Brief, p. 35), the Tennessee statute follows the pattern of similar statutes existing in most of the states and follows the pattern of the Federal statute (Miller Act) governing public works of the United States which contains a similar requirement of written notice.

Petitioner has stressed at length its quite unfounded claim that the provision of the Tennessee statute requiring suit to be brought promptly is "remedial". Both the Tennessee and New York Courts properly found against petitioner on this point.

However, in any event, it is, of course, obvious that no argument that the Tennessee statute is "remedial" can in any possible way be urged in connection with petitioner's failure to give written notice of its claim.

POINT III.

The Tennessee and New York decisions in the present case are entirely consistent with their respective prior decisions and the decisions of this Court.

(A)

The decision of the Tennessee Supreme Court in the *City of Knoxville* case is not as petitioner states at page 14 of its brief merely a holding that compliance with the Tennessee statute was a condition precedent to a suit in Tennessee.

While the action before the Tennessee Supreme Court was necessarily an action in a Tennessee court, the holding of the Tennessee Supreme Court was a statement of a general principle, *i. e.*, that the bond here involved was a statutory bond subject to the Tennessee statutory requirements of prompt notice of claim and commencement of action, compliance with which were conditions precedent to any recovery by a materialman upon the bond.

(B)

Petitioner is also mistaken in stating at pages 11 and 12 of its brief that the decision of the Tennessee Supreme Court in *Ben M. Hogan* v. *Walsh & Wells*, 177 S. W. (2) 835, is at variance with the decision of that Court in *City of Knoxville* v. *Burgess*, which was followed in the present case by the New York Court of Appeals.

The Tennessee Supreme Court in the *Hogan* case expressly distinguishes its decision in that case from its decision in the *City of Knoxville* case by pointing out the respective bonds involved in those cases differed, in that the bond in the *Hogan* case contained an express provision which gave to laborers and materialmen the right to sue "independently of said statutes".

Referring to its decision in the *City of Knoxville* case, and in two other similar earlier cases, the Tennessee Supreme Court said:

> "As to that part of the bond relating to the claims of laborers and furnishers of material, the condition of the bond is that the contractor 'shall assure and protect all laborers and furnishers of material on said work * * *, and also independently of said statutes.'
>
> In the three cases cited above the bonds were held to be statutory bonds because the conditions in the bonds were limited to the language of the statutes, and the furnishers of labor and materials had no right of action against the obligors except by virtue of the statutes. Here the language of the bond is broader and more comprehensive and exceeds the provisions of the statutes and refers to the statutes, 'and also independently of said statutes.'"

(C)

Nothing in the present case conflicts in the slightest degree with any holding of this Court in the case of *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, cited by petitioner. The partial quotation given at page 17 of petitioner's brief refers to an entirely different Tennessee statute and deals with facts completely dissimilar from anything involved in the present case.

Midstate Co. v. *Penna. R. Co.*, 320 U. S. 356, cited at page 16 of petitioner's brief, involved the validity of an agreement between an interstate rail carrier and a shipper, in terms extending the three year period within which the carrier could sue the shipper for freight charges. This Court by Mr. Justice Rutledge said:

> "The ultimate question is whether the action is brought in time under par. 16 (3) (a) of the Interstate Commerce Act." * * *

"We think petitioner's (shippers) position must be sustained. In short this is that the agreement is invalid as being contrary to the intent and effect of the section and the Act."

(D)

The present decision by the New York Court of Appeals neither "departs" from, nor produces the slightest confusion with, its prior decisions. In support of some alleged "departure", petitioner, p. 18 of its brief, refers to *Clark Plastering Co.* v. *Seaboard Surety Co.*, 259 N. Y. 424. This case was cited by the Court of Appeals in the opinion in the present case and does not conflict at all with the present decision. Moreover, the Court of Appeals, in construing the New Jersey materialmen's statute, held in *Walsh & McGee Steel Co.* v. *Fidelity & Deposit Company of Maryland*, 260 N. Y. 496, that the materialman had not substantially complied with the New Jersey statutory requirement that a written statement must be given within eighty days, and dismissed the complaint because of the failure by the materialman to comply with said statutory condition precedent.

(E)

No question of anti-trust law arises in this case where the contract is purely local in character.

The contract under which petitioner furnished the material was executed, delivered, and to be performed wholly within the State of Tennessee.

The bond here involved was executed, delivered and to be performed wholly within the State of Tennessee.

Petitioner's references to "national industry" and "national business" and its characterizing the petitioner as a "national business enterprise" are statements quite outside of the record and in any case establish nothing.

No question of enforcing national legislation arises in this case. It is a fact (as petitioner concedes at page 13 of its brief) that Congress has not legislated in any way with respect to local public works, like the present, so common among the States.

CONCLUSION.

The writ prayed for should be denied.

Respectfully submitted,

G. ARTHUR BLANCHET,
OSCAR R. HOUSTON,
ARTHUR W. CLEMENT,
Counsel for Respondent.

22

Supreme Court of the United States

OCTOBER TERM, 1944.

(No. 138)

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner,

against

NEW AMSTERDAM CASUALTY COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

GRAYBAR ELECTRIC COMPANY, INC.,
Petitioner,

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INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1944.

GRAYBAR ELECTRIC COMPANY, INC., Petitioner, *against* NEW AMSTERDAM CASUALTY COMPANY, Respondent.	No. 138.

PETITIONER'S REPLY BRIEF.

Respondent's arguments, included under Point II of its brief in opposition to petitioner's application for a writ, are misleading, even if inadvertently so.

A.

The provisions of the Tennessee short statute of limitations relating to the giving of written notice are not different in character from the provisions of the same statute specifying the time within which suit shall be maintained in the Courts of Tennessee.

That just such a statutory requirement of preliminary notice affects merely the remedy, and in this respect is as clearly remedial as the requirement for the commencement of suit within the prescribed statutory period, is illustrated by this Court's own holding in *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276. Construing an identical Minnesota statute, this Court said (p. 285 of its Opinion):

> "In the case now before us, we agree with the Minnesota Supreme Court in the view that *the*

> *requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond, affects the remedy and not the substantive agreement of the parties.* And although the statute as it stood when the bond was given (R. L. 1905, §4539) must, under *Grant* v. *Berrisford, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation.*" (Italics ours.)

This is the normal and customary interpretation of such a statute. No radical departure from this generally accepted current of authority such as that contended for by the respondent should be imputed to the Supreme Court of Tennessee.

The familiar principle is well stated in *Meisenheimer* v. *Kellogg,* Supreme Court of Wisconsin, 106 Wis. 30, 81 N. W. 1033:

> "The radical difficulty with this argument (i. e. that the giving of notice was a condition precedent to the cause of action) is that *the notice required by the statute above mentioned is not a condition precedent to the cause of action, but is merely a statute of limitation.* The distinction was clearly pointed out in the recent case of Relyea *v.* Pulp Co., 102 Wis. 301, 78 N. W. 412. It was there stated, in substance, that a notice required to be given before the commencement of a purely statutory action (such as an action against a city for injuries resulting from a defective highway) is necessarily a condition precedent to the cause of action, because, the entire right of action being given by statute, it only comes into existence when the required notice has been given, but that the notice required to be given by statute prior to the commencement of an action to enforce a common-law right, such as the case now before us, is *necessarily a statute in the nature of a statute of limitations,*

> *because the right exists without the aid of any statute.* No argument in support of this conclusion would seem to be required, *the right of action existing independently of statute.* The requirement of notice within a certain time simply sets a new time limit within which a certain step necessary to enforce the right must be exercised. It is not a condition which must exist before any right comes into being." (Italics ours.)

The right of action at common law on such a bond as the present one, independently of statute, has often been recognized by the Tennessee Court (see cases cited, p. 17, Petitioner's Main Brief) and by this Court in *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657 (p. 17, Petitioner's Brief).

The distinction is well put in *Kansas City Hydraulic Press Brick Co.* v. *National Surety Co.*, 167 Fed. 496 (pp. 505 and 506):

> "In the present case, while the statute required the contractor to furnish a bond, the right of action is not created by the statute. It imposed no liability upon the defendant. On the contrary, defendant's liability arises solely out of contracts into which it voluntarily entered for a valuable consideration. In the case of statutes creating stockholders' liability, the cause of action rests much more closely upon the statute than in the present case, and yet it is held that the limitation in such statutes is not a part of the right. The liability, 'though statutory in its origin, is contractual in its nature.' Ramsden *v.* Knowles, 151 Fed. 721, 724, 81 C. C. A. 105, 108, 10 L. R. A. (N. S.) 897. The limitation in the present case, therefore, is no part of the right, but relates exclusively to the remedy."

Finally within the familiar principle of law (as restated by this Court in *Midstate Horticultural Co. Inc.* v. *Pennsylvania Railroad Co.*, 320 U. S. 356) that the provisions of remedial statutes may alone be waived but not conditions precedent to a cause of action, the Tennessee Court's action in the *City of Knoxville* v. *Burgess*, ... Tenn. ....., 175 S. W. (2nd) 548, case (Appendix A), in remanding the case on the issue of waiver, is proof positive that the highest Court of that State regards the statute as remedial.

In fact that Court, in its remanding order, characterized this very statute as a statute of limitations, saying:

> "3. This cause is remanded to the Chancery Court of Knox County to the end that appellee New Amsterdam Casualty Company may be required to answer the averments of the cross-bill of Aluminum Company of America, and particularly the averments thereof with respect to the alleged waiver of or estoppel to rely upon the defense of the *statute of limitations*, and for further proceedings in conformity to the opinion of this Court, which opinion is ordered filed and made a part of the record herein." (Italics ours.)

B.

There has never been any determination by the Tennessee Courts that the Tennessee statute has any application whatsoever except to the rights of parties litigant who seek relief in the Courts of that State. The language of all of the decisions of the Courts of Tennessee has been confined to suits within that State.

The Courts of that State have not had, so far as the reported decisions disclose, occasion to pass upon the rights under such a bond as that in suit when such rights have been established by a judgment entered in another forum. Petitioner respectfully asserts that the Courts of the State

of Tennessee would be required to give full faith and credit to a judgment so obtained in the Courts of another State, although the terms of the Tennessee statute were not complied with.

Respondent in effect imputes to the Courts of Tennessee not only a decision which thus far those Courts have never made, but which, if made, might contain serious constitutional infirmities.

C.

The fears expressed by the respondent (p. 8 of its Brief), as to the confusion which it claims will result if petitioner's position is sustained and the lack of uniformity which it asserts will result therefrom, are quite unfounded.

In fact, respondent's assertion (Respondent's Brief, last paragraph, p. 8) of the principle that rights under a contract should be determined by the law of the State where it is to be performed, amounts to an acknowledgment that the petitioner's recovery here was just and proper.

Respondent has lost sight of the fact that the contract in question was one made between the respondent, a New York corporation, and petitioner, likewise a New York corporation. That contract called for nothing more in the way of performance than payment by the respondent-debtor to the petitioner-creditor, which payment, in accordance with elementary rules of law, was to be made within the State of New York.

The contract sued upon is a contract between residents of the State of New York. It has been sued upon in that State and, with respect to this plaintiff at least, it was to be performed in the State of New York. How such a contract can possibly be validly held to be affected by a Tennessee statute, characterized by the highest court of that State as a Statute of Limitations, is difficult to see.

Petitioner respectfully requests that the writ prayed for should be granted.

Dated: July 19, 1944.

Respectfully submitted,

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Of Counsel.

Appendix A.

IN THE

SUPREME COURT OF TENNESSEE,

SEPTEMBER TERM, 1943.

KNOX EQUITY—CAUSE NO. 3.

CITY OF KNOXVILLE,

vs.

MELVIN F. BURGESS, INC., *et al.*

Reversed and Remanded.

Be it remembered that on this 20th day of November, 1943, this cause came on to be finally heard upon the transcript of the record from the Chancery Court of Knox County, the assignment of errors filed in behalf of appellant, Aluminum Company of America, the briefs of *amici curiae* representing Southern Wood Preserving Company and Graybar Electric Company, and the entire record at large, from a consideration of all of which the Court doth adjudge and decree as follows, to-wit:

1. That there is no error in the decree of the Chancellor with respect to the character of the bond or undertaking sued on in the cross-bill of appellant, Aluminum Company of America, said holding being that, insofar as said bond or undertaking inures to the benefit of furnishers of labor or materials, the same is a statutory bond and subject to all of the provisions of Section 7955-7959 of the Code of 1932.

2. That under a proper construction of Section 7959 of the Code of 1932, the period of limitations of six months contained therein is applicable to all suits brought on the bond hereinbefore referred to, irrespective of whether such suits are instituted by one laborer or materialman or by several laborers or materialmen.

3. This cause is remanded to the Chancery Court of Knox County to the end that appellee New Amsterdam Casualty Company may be required to answer the averments of the cross-bill of Aluminum Company of America, and particularly the averments thereof with respect to the alleged waiver of or estoppel to rely upon the defense of the statute of limitations, and for further proceedings in conformity to the opinion of this Court, which opinion is ordered filed and made a part of the record herein.

4. The appellant, Aluminum Company of America, and surety on its appeal bond, and appellee New Amsterdam Casualty Company, will each pay one-half of the costs of the appeal for which executions may issue.

(Signed) ALEX W. CHAMBLISS,
" ALAN M. PREWITT,
" F. H. GAILOR.